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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 66

CASE-SWAYNE CO., INC., *Petitioner,*

v.

SUNKIST GROWERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CASE-SWAYNE CO., INC.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (R. 162-189) are reported at 369 F. 2d 449. The District Court's Pre-Trial Order No. One, dated April 21, 1964, involving the issue here presented, (R. 27-30) is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on November 21, 1966. On December 16, 1966, petitioner filed a timely petition for rehearing pursuant to Rule 23 of the Rules of the Court of Appeals for the Ninth Circuit. On

January 12, 1967, said petition was denied by the Court of Appeals. On March 17, 1967, petitioner filed its petition for writ of certiorari. The petition was granted May 15, 1967. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

Statute Involved

Section 1 of the Capper-Volstead Act (7 U.S.C. 291) in pertinent part provides:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

Question Presented

Whether the majority of the Court of Appeals erred in holding that an incorporated association is duly organized under section 1 of the Capper-Volstead Act notwithstanding that approximately 15% of the association's members are not producers of agricultural products and not associations organized under said section but are profit making corporations.

Statement

Jurisdiction of the District Court was based on sections 1 and 2 of the Sherman Act and section 4 of the Clayton Act (15 U.S.C. 1, 2 ,and 15). (Complaint, R. 1).

On April 15, 1958, petitioner filed its complaint against Sunkist Growers, Inc. (hereinafter referred to as Sunkist), the Exchange Orange Products Co. (hereinafter referred to

as Exchange Orange) and Exchange Lemon Products Co. (hereinafter referred to as Exchange Lemon), alleging in part that these parties had combined and entered into contracts and conspired to restrain and monopolize trade and have monopolized and attempted to monopolize the trade in product oranges grown in California and Arizona in violation of sections 1 and 2 of the Sherman Act, alleging damages in the sum of $800,000.00 and praying that the damages be trebled pursuant to section 4 of the Clayton Act (R. 1-12).

On July 21, 1958, Sunkist, Exchange Orange and Exchange Lemon answered the complaint and (as relevant to this writ) alleged the affirmative defense that they were agricultural associations meeting the requirements of section 6 of the Clayton Act.[1] (15 U.S.C. 17) and section 1 of the Capper-Volstead Act (R. 13).

On October 31, 1958, Exchange Orange and Exchange Lemon merged into Sunkist. Sunkist assumed all the obligations of the merged corporations and pursuant to motion of Sunkist, Exchange Orange and Exchange Lemon were dismissed from the action (Pl. Ex. 1A, R. 120-160, 119; 14-19).

In April 1961, the parties presented to the District Court a stipulation of facts relating to the defense of section 1 of the Capper-Volstead Act, hereinafter referred to as the Capper-Volstead stipulation. The stipulation was filed October 27, 1964 (R. 32-119).

In the stipulation the parties stipulated to facts "deemed by each to support its legal theory" . . . In order to frame

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[1] The Capper-Volstead Act made the provisions of section 6 of the Clayton Act applicable to "associations" such as Sunkist, Exchange Orange and Exchange Lemon having capital stock. The issues raised by section 6 of the Clayton Act have been deemed embraced within the issues raised by the Capper-Volstead defense. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Producers Ass'n, Inc.* v. *United States*, 362 U.S. 458 (1960).

the "legal issue" and "to obtain a determination by the Court of said issue" and stipulated to the "issues of law" for the District Court to determine (R. 33, 43-44).

On June 29, 1962, petitioner filed a supplemental complaint pleading transactions occurring since the date of the original complaint and alleging additional damages from April 15, 1958 to January 31, 1962, in the sum of $1,412,000 (R. 20-25).

At a hearing, March 2, 1964, the parties stipulated that the facts as stipulated to in the Capper-Volstead stipulation were in all material respects the same except for the merger of Exchange Orange and Exchange Lemon into Sunkist (October 31, 1958) and applied to the entire period of the action (R. 25-26).

On April 21, 1964, the Court signed Pre-Trial Order No. One. The District Court ruled therein that Sunkist, Exchange Orange and Exchange Lemon had complied with section 1 of the Capper-Volstead Act, and consequently a conspiracy in violation of the Sherman Act could not exist solely between Sunkist, Exchange Orange and Exchange Lemon, and ordered two separate trials, the first to cover the issue of liability and, if the petitioner prevailed, the second to cover the issue of damages. (R. 27-30). On May 27, 1964, in pretrial order No. Two, the Court ordered the issues in the action confined to whether Sunkist had a monopoly on oranges grown in California and Arizona, whether it had illegally used such monopoly power or had attempted to monopolize such oranges and damages (R. 30-32).

Exchange Orange was a 100 percent owned subsidiary of Sunkist. Exchange Lemon's membership was composed the same as Sunkist's membership. (Paragraphs 7 and 8 Capper-Volstead Stipulation, R. 36-37). See also the Supreme Court's decision in *Sunkist Growers, Inc.* v. *Winckler*

& Smith Citrus Products Co., 370 U.S. 19 (1962) at p. 22, hereinafter referred to as the *Winckler* case.) Thus, Exchange Orange and Exchange Lemon would fall with Sunkist. Therefore, in further discussion of the membership requirements of an association under section 1 of the Capper-Volstead Act we refer only to the composition of Sunkist's membership.

As is apparent from the Capper-Volstead stipulation, Sunkist's members *from whom it obtains its oranges* are citrus packing houses (hereinafter referred to as "packing houses") whose functions we mention later. When the packing house is an association of orange growers duly organized pursuant to the provisions of the Act, we have no quarrel with its membership in a cooperative.[2] For we deem that under this Court's decision in the *Winckler* case that a cooperative's members may consist of either actual farmers (or actual fruit growers in this case) or associations of actual farmers (or actual fruit growers) duly organized under the Act. For convenience, therefore, we argue only the specific contention presented by the writ of certiorari—that members of cooperatives must be actual farmers—or as applied to this case—actual *growers* of fruit.

Trial was had. Sunkist, without offering evidence, moved for a directed verdict which motion was granted. On March 2, 1965, a final judgment was entered. (R. 161).

On November 21, 1966, the Court of Appeals reversed the judgment of the District Court and held that petitioner had made a prima facie case for the jury that Sunkist had wrongfully exercised monopoly power and had intentionally attempted to monopolize the trade in product oranges in the California-Arizona market. *But* (one judge dissenting), the

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[2] As used in this brief the word "cooperative" refers to an association duly organized under section 1 of the Capper-Volstead Act.

Court of Appeals held that the District Court had correctly ruled that Sunkist had complied with section 1 of the Capper-Volstead Act, the issue we are here concerned with. (R. 162-189).

The facts relevant to the Capper-Volstead issue are as follows:

Sunkist obtained its fruit from its packing house members. The fruit *growers* were not Sunkist members except for certain "*Corporate Growers*" who had sufficient volume to install packing house facilities and who supplied 4.72 percent of fruit handled by Sunkist (R. 34-35).

The packing houses we are here concerned with are those denominated "*Agency Associations*" in the Capper-Volstead stipulation (R. 35).

To prevent confusion it should be kept in mind that Sunkist in its 1955 Sunkist-District Exchange-Association Agreement with packing houses (Ex. A to Capper-Volstead Agreement, R. 49) and in its Amended Articles of Incorporation and By-laws after the October 31, 1958 merger (Pl. Ex. 1A, R. 131, 119) refers to its packing house members collectively as "associations" even though the so-called "*agency associations*" (the packing houses we are concerned with) are *not* fruit growers, *not* associations of growers, *not* cooperatives but profit-making enterprises.

When this action was filed (April 15, 1958), the packing houses derived their Sunkist membership from their association with District Exchanges (Paragraphs 5 and 6 Capper-Volstead Stip. R. 36; Article XII, Sunkist's Articles of Incorporation R. 95) opening paragraph and paragraph 2 Exh. A to Capper-Volstead stipulation (R. 48-49). (See also the *Winckler* case, 370 U.S. at p. 21).

After the merger of October 31, 1958, and to January 31, 1962, (the end period encompassed by this action) the pack-

ing houses were *specifically designated members* of Sunkist (Article 2.2, Sunkist's "Amended Articles of Incorporation and By-Laws", Pl. Ex. 1A, R. 131, 119).

And, as mentioned above, the parties stipulated that the composition of Sunkist's membership were in all material facts the same for the entire period covered by this law suit (April 15, 1958-January 31, 1962) with exception of the merger of Exchange Orange and Exchange Lemon into Sunkist, October 31, 1958 (R. 25-26).

The function of the packing houses in the Sunkist system was to enter into agreements with growers for the grower's fruit, pick the fruit (after the grower had brought it to the point where it was ready to pick), wash, grade, and market it through Sunkist (Capper-Volstead Stip. R. 41-42); para. 23 of Exh. A to the Stip. (R. 58); Article 2.3; "Sunkist's Amended Articles of Incorporation and By-Laws", PL. Ex. 1A, R. 131, 119).

The "make-up" of Sunkists's *"Agency Associations"* members was stipulated to in paragraph 4 of the Capper-Volstead Stip. (R. 35).

> "4. *Agency Associations.* Agency associations constitute 14.91% by number and 12.94% by volume of all associations in the Sunkist system. The agency association is normally a private corporation which owns and operates packing house facilities. Some "agency associations" are individually owned enterprises and partnerships . . . *Such agency associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act."* (our emphasis)

The *"Agency Associations"* are *not* fruit growers. They (as is stipulated) are *not* cooperatives. They *purchase* the oranges they market through Sunkist from growers for the consideration of *"cost plus a fixed fee"* per box of oranges.

Hence, the agency association does not participate in either gain or loss involved in marketing through Sunkist. (Capper-Volstead Stip., R. 35-36; Exh. B to said stipulation which is "a contract between such an agency association and its growers which may be deemed as typical of such associations" (R. 70-72; 36)).

ARGUMENT

Under Section 1 of the Capper-Volstead Act Members of a Cooperative Must Be Actual Farmers That Grow the Agricultural Products They Market Through Their Cooperative.

A. *The Language of the Act.* The Act provides that persons engaged in the production of agricultural products *"as farmers" "or fruit growers"* may act together in associations. And further, that persons engaged in producing agricultural products "as farmers" "or fruit growers" may act together in associations "in collectively processing, preparing for market, handling, and marketing . . . *such products of persons so engaged.*"

This language alone would appear sufficient to limit members of cooperatives to actual farmers who raise the crop they market through their association. Congress made doubly certain that this should be the construction of the Act. In order to preclude any construction that would permit handlers of agricultural products (such as packing houses) who are not farmers to qualify as members of a cooperative, Congress added the descriptive words: "as farmers, planters, ranchmen, dairymen, nut or fruit growers." (This is borne out by the legislative history of the Act discussed *infra.*)

The language of the Act is not ambiguous. It is clear and definite. We submit that under the language members

of cooperatives (as applied to fruit growers) must actually be "fruit *growers.*"

B. *The Legislative History.* The legislative history of the Act shows that the Act's provisions qualifying persons for membership in a cooperative (that they must be "engaged in the production of agricultural products") meant *actual farmers* or *growers* of crops. Such history shows that the descriptive words "*as farmers*" and (as applied to this case) "or *fruit growers*" were made part of the Act as a precaution so that business concerns such as flour mills (or as in this case citrus packing houses) who in a very broad sense, produce agricultural products were *not* intended to qualify for membership in cooperatives. The legislative history shows that the purpose of the Act was to keep the boys on the farm, retain a country dotted with individually owned and operated farms, permit the farmer (who knows no eight-hour day) to obtain a better price for his crop.

> "**Mr. Cummins.** The suggestion made a moment ago by the Senator from Minnesota prompts me to ask him this question, which has perplexed me somewhat.
>
> The first two lines of the bill, together with the first word of the third line, read as follows:
>
> That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers—
>
> May act together, and so forth. Are the words 'as farmers, planters, ranchmen, dairymen, nut or fruit growers' used to exclude all others who may be engaged in the production of agricultural products, or are those words merely descriptive of the general subject?"
>
> "**Mr. Kellogg.** I think they are descriptive of the general subject. I think 'farmers' would have covered them all.
>
> "**Mr. Cummins.** I think the Senator does not exactly catch my point. Take the flouring mills of Minneapolis:

They are engaged, in a broad sense, in the production of an agricultural product. The packers are engaged, in a broad sense, in the production of an agricultural product. The Senator does not intend by this bill to confer upon them the privileges which the bill grants, I assume?

"**Mr. Kellogg.** Certainly not; and I do not think a proper construction of the bill grants them any such privileges. The bill covers farmers, people who produce farm products of all kinds, and out of precaution the descriptive words were added.

"**Mr. Townsend.** They must be persons who produce these things.

"**Mr. Kellogg.** Yes; that has always been the understanding." (62 Cong. Rec. 2052 (1922), Senators Cummins, Kellogg and Townsend)

* * * * * * *

"Now, the farmer is in very much the same position. He is a small holder of land. His means and his opportunities are not sufficient to allow him to take any steps whatever in placing his products with the ultimate consumer or, usually, with the middleman." (62 Cong. Rec. 2050 (1922), Senator Kellogg)

* * * * * * *

"The farmer is an individual unit. He must manage his own farm. He must have his own home." (61 Cong. Rec. 1040 (1921), Representative Towner)

* * * * * * *

"Mr. President, startling facts are disclosed by the new census figures. The drift from the farm to the city is everywhere evident. In Illinois every county except five shows a decrease in rural population, and the cities show an increase. This is typical of the Nation." (62 Cong. Rec. 2060 (1922), Senator Capper)

* * * * * * *

". . . More and more it has become evident that the growers must have an opportunity to merchandise their products in an orderly way, instead of being compelled to dump them on a glutted market at prices below cost of production.

"Mr. President, every statesman looks forward to a condition as ideal when the whole country will be dotted with small farms, each operated by its owner." (62 Cong. Rec. 2058 (1922), Senator Capper)

* * * * * * *

"Mr. President, of course, the farmer can not consolidate his land into great holdings or into corporate ownership, and he should not do so. The hope of this Nation, the hope of any nation, the hope of the independence and the prosperity of our people, our very civilization, depends upon the individual ownership and proprietorship of the soil." (62 Cong. Rec. 2051 (1922) Senator Kellogg)

* * * * * * *

"It aims to authorize cooperative associations among farmers for the purpose of marketing their products. . . . The object of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns.

"**Mr. Sabath.** In what way does this bill differ from the Clayton Act? The Clayton Act in a sense permits the farmers to organize.

"**Mr. Volstead.** The Clayton Act does not permit them to have any stock or operate for any profit. This bill makes it possible for them to have a small amount of stock and to operate to some extent for profit, but the profit must not exceed 8 per cent on their capital." (61 Cong. Rec. 1033 (1921), Representatives Volstead and Sabath)

* * * * * * *

"The purpose of this bill is to enable the farmers to organize in associations maintaining selling agencies and doing anything else that is necessary to enable them to increase the prices of their products." (61 Cong. Rec. 1043 (1921), Representative Husted)

* * * * * * *

"The producers of agricultural products have their troubles in obtaining farm help. The boys have left the farm. The farmers' sons who went to the late war have returned to the cities, attracted by the 'Great White Way,' and have lost their interest in the farm. One-half of the inhabitants of this country are living in the cities, where the problem of housing has become acute and the further problems of how to obtain employment has become a menace in our land. . . . The farmer is not and never has been a profiteer. He knows no 8-hour day." (61 Cong. Rec. 1044 (1921), Representative Hersey)

* * * * * * *

"Farmers must be paid as much net profit as other vocations bid. The movement of population from the country to the city will not end until that profit is paid." (61 Cong. Rec. 1041 (1921), Representative Sumners)

* * * * * * *

"Individual growers can not begin to handle marketing problems on an intelligent basis, because these problems are essentially group problems. The individual farmer has no more chance of selling his production fairly and intelligently over a longer period of time than has the individual shoemaker in a great shoe factory of selling his particular share of manufactured product distinct and separate from the whole of the products of his fellow workmen." (62 Cong. Rec. 2059 (1922), Senator Capper)

* * * * * * *

"**Mr. Reavis.** Premised upon a statement. Coming from an agricultural district, I state it as a fact that the farmer has always been compelled to take for his product the price that the purchaser offered, or he does not sell it. This bill is for the purpose of permitting an organization that will place him on an equality with every other American business man and in some measure permit him to fix the price of his products." (61 Cong. Rec. 1035 (1921), Representative Reavis)

* * * * * * *

"**Mr. Reavis** (continuing). I want to suggest to him that the farmer is the only business man in America to-day who does not fix the price of the products that he sells.

"The farmer goes to the grain buyer in the town where he does his business and if he disposes of his product he disposes of it at the price that he is offered; he never fixes the price. This legislation is primarily inspired by the desire to put the farmer in a condition, through cooperation and organization, where in some measure he may overcome the difficulties that inhere in his business, that make cooperation and organization almost impossible, to relieve him in some measure from his natural handicaps and put him on an equal footing with all the other business men of America and permit him in some measure to fix the price of the thing that he raises." (21 Cong. Rec. 1038 (1921), Representative Reavis)

* * * * * * *

"Section 1 defines and limits the kind of associations to which the legislation applies. These limitations are aimed to exclude from the benefits of this legislation all but *actual farmers* and all associations not operated for the mutual help of their members as such producers." (House Report No. 24, 67th Congress, 1st Session) (Our emphasis)

The legislative history of the Act is crowded with similar references. However, we believe it would be "carrying coals to Newcastle" to quote more legislative history.

It is true, as this Court stated in the *Winckler* case that the legislative history of the Act reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange. But in none of the references cited by the Court (370 U.S. at p. 28, footnote 9) or in any we have found does it appear that members of the organization were not growers or associations of growers. To the contrary, Senator Walsh, in mentioning the organization refers to what are the packing houses as "*local associations* organized substantially as the associations contemplated and provided for in the bill are to be organized" (62 Cong. Rec. 2277).

C. *Prior decisions by this Court.* We believe that the precise question presented on this writ of certiorari is one of original impression and that it has never been decided by this Court. Following, we discuss briefly decisions of this Court which deal with cooperatives and which we believe support the petitioner's position in this case.

1. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962).

The majority of the Court of Appeals in its decision in the instant case stated:

> "The District Court concluded, and we think correctly, that under the decision of the Supreme Court in *Sunkist Growers, Inc.* v. *Winckler & Smith Co.*, supra, Sunkist Growers, Inc., is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail." (R. 180)

The Supreme Court in the *Winckler* case did *not* hold that Sunkist was a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. Winckler conceded that Sunkist was such a cooperative.

As the dissenting member of the Court of Appeals stated:

> "The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 8 L Ed. 2d 305, 82 Sup. Ct. 1130 (1062). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler*, of which the appellant here was not one, that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court in granting certiorari, 368 U.S. 813 (1961), expressly limited its consideration to a single question, namely,
>
> 'Where a group of citrus fruit *growers* form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these growers, through the agency of these three cooperatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof

processed and marketed by them?' (Emphasis supplied.)" (R. 185-186)

The issue decided by this Court in the *Winckler* case involved Sunkist's contention that 'Sunkist, Exchange Orange, and Exchange Lemon being made up of the same growers of associations, cannot be charged with conspiracy among themselves." (370 U.S. at p. 20). This Court construed that the District Court's instructions "quite plainly left it open for the jury to base their verdict upon a finding of a conspiracy among petitioners [Sunkist and Exchange Orange] and Exchange Lemon" (370 U.S. at p. 25). It stated: "We are squarely presented, then, with the question of whether Sunkist, Exchange Orange and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of §§ 1 and 2 of the Sherman Act." It held: "We conclude not." (370 U.S. 27).

We submit: That is *what* this Court held respecting Section 1 of the Capper-Volstead Act and that is *all* this Court held.

The majority of the Court of Appeals also stated:

> "Associations organized under the Capper-Volstead Act 'may make the necessary contracts and agreements to effect' the purposes of the Act, i.e., 'collectively processing, preparing for market, handling, and marketing' their products. (7 U.S.C. 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the '*packing is done by local associations* * * * and the processing by separate organizations' does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. *Sunkist Growers, Inc.* v. *Winckler & Smith Co.* supra." (Our emphasis.) (R. 182-183)

The quotation from the *Winckler* case related to the Supreme Court's ruling that cooperatives organized by the same grower associations may be deemed one cooperative. The quoted provision of section 1 that associations may make the necessary agreements to effect the purposes of the Act is not relevant to the question here presented. Even assuming that said provision authorizes agreements between cooperatives and profit making enterprises for packing house services—The question presented by the writ is whether an incorporated association is duly organized under Section 1 of the Act notwithstanding the stipulation of the parties that approximately 15% *of its members* are *not* growers and *not* cooperatives. As was stated by the dissenting Judge of the Court of Appeals (R. 186-187 footnote 1):

> "The stipulation [Capper-Volstead stipulation] does *not* say that the associations were independent contractors. It recites that they were '*members*' of the Sunkist system". (Emphasis dissenting Judge)

Further, the profits of the Sunkist members described as "*Agency Associations*" were, under their agreements with growers, as assured as under cost plus government contracts. Such agreements therefore, could hardly convert them into cooperatives—Particularly as *it is stipulated* that they are *not* cooperatives.

Even if the Supreme Court in the *Winckler* case *had* held that Sunkist was organized in compliance with Sec. 1 of the Capper-Volstead Act, it decision would be neither binding nor precedent here. As the dissenting Judge of the Court of Appeals stated:

> "Even if the issue had been determined by the Supreme Court in *Winckler*, the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to

apply. The privilege to act together in 'exempt' associations is conferred only upon 'persons engaged in the production of agricultural products . . .' 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, *supra*, indicates, it is clear that the composition is no longer the same. In our case, it is conceded that the so-called 'agency associations,' which comprise almost 15% of the membership of the Sunkist organization, are *not* growers or producers." (Judge's emphasis.) (R. 186)

Further: The composition of Sunkist's membership in the *Winckler* case as it appears from the briefs to this Court and from this Court's decision in that case was that *all* Sunkist's packing house members were associations composed of fruit growers. On pages 5 and 6 of Sunkist's brief to this court in the *Winckler* case (filed February 7, 1962) Sunkist stated:

"*Each of these corporate entities* [Sunkist, Exchange Orange and Exchange Lemon] *handles only the fruit of Sunkist grower-members.* . . . Each of them complies in all respects with the organizational and other conditions prescribed by the Capper-Volstead Act for immunity from the sanctions of the antitrust laws in respect of such collective processing, handling and marketing of agricultural products. Indeed, that they do so comply was conceded below by all concerned. . . . *At the base of the Sunkist system are the individual growers. It is their fruit, and only their fruit that is handled by Sunkist.* It is they who control and manage all components of the Sunkist cooperative organization. *The individual growers have organized into local associations.* . . ." (Our emphasis.)

The respondent Winckler did not challenge Sunkist's description of the Sunkist system. To the contrary, on page 7 of its brief to this court (filed March 7, 1962), Winckler stated:

> "With a few additions deemed essential to an adequate factual presentation, respondents accept petitioner's description of the organization and functions of the constituent elements of the so-called Sunkist system of cooperatives."

The Court appears to have accepted these representations that *All* of Sunkist's packing house members were composed of *grower associations.*

> "Sunkist Growers, Inc. has at its base 12,000 growers of citrus fruits in California and Arizona. *These growers are organized into local associations which operate packing houses.*" (Emphasis supplied) (370 U.S. at p. 21).
>
> • • • • • • • •
>
> "In sum; *the individual growers involved each belong to a local grower association.*" (Our emphasis.) (370 U.S. at p. 22).

Whatever may have been the situation in the *Winckler* case (where it was unchallenged that all the packing houses were grower associations) it is clear from the record in *this* case that approximately 15% of Sunkist's packing house *members* supplying approximately 13% of Sunkist's fruit were *not* fruit growers, *not* associations of fruit growers, *not* cooperatives but profit making corporations.

2. *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458 (1960)

Statements of the Supreme Court in the *Milk Producers* case indicate its recognition that under the Act members of cooperatives must be *actual* "farmers" (or, as applied to this case actual "fruit growers"):

> ". . . We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." . . .
>
> "This [referring to House Report No. 24, mentioned *supra*] indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperatives will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." (362 U.S. at p. 466)

3. *United States* v. *Borden, Co.*, 308 U.S. 188 (1939)

The *Borden* case contains statements of like import. As quoted by the dissenting judge of the Court of Appeals:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products*. . . . *They* are authorized to act together 'in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce' their products. . . .
>
> "The right of *these agricultural producers* thus to unite . . . cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." *United States* v. *Borden Co.*, 308 U.S. 188, 204-205, 84

L.Ed. 181, 60 Sup. Ct. 182 (1939) (Emphasis supplied.)." (R. 187)

It is stipulated that Sunkist's agency association members "do not qualify as . . . cooperative associations under Section I of the Capper-Volstead Act" (R. 35). *Hence, they are admittedly not entitled to exemption from the antitrust laws accorded to agricultural cooperatives.* In the *Borden* case the Court ruled that a cooperative violated section 1 of the Sherman Act when it conspired with non-cooperatives to fix milk prices. Thus it appears inconsistent to permit non-cooperatives to fix prices as members of a cooperative. This inconsistency was pointed out by the dissenting member of the Court of Appeals in referring to his quotations from the *Borden* case, the *Milk Producers* case and the *Winckler* case.

> "The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with non-producers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of non-producers, may yet qualify for the exemption." (R. 189)

Conclusion

The number of Sunkist packing house members that are *not* fruit growers, *not* associations of fruit growers, *not* cooperatives but profit making corporations is approximately 15 percent and they supply approximately 13 percent of Sunkist's fruit. (*The "Agency Associations"*, para. 4, Capper-Volstead Stip.) (R. 35)

Such amounts are not *de minimis*. If 15 percent of a cooperatives' members need not be producers of agricultural products, why not 50 percent—or 100 percent? Such

a construction of section 1 of the Capper-Volstead Act would nullify the specific mandate of Congress that only "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations . . . ."

Such construction would set at naught the intention of Congress. (See particularly colloquy between Senators Cummins, Kellogg and Townsend quoted *supra*, p. 9-10 Contrary to such intention, the Act would not simply permit *farmers* to associate and fix prices. *Such construction would permit handlers and users of agricultural products (such as packing houses, flour mills, packers of fruits and vegetables) to associate under the Act and fix prices.*

The decision of the majority of the Court of Appeals that Sunkist, and Exchange Orange and Exchange Lemon before they merged into Sunkist, were organized in compliance with section 1 of the Capper-Volstead Act should be reversed. And this Court should order that under the stipulations of the parties in this cause, as a matter of law, the defendants below were not organized in compliance with section 1 of the Capper-Volstead Act and were entitled to none of the privileges conferred by that Act.

Respectfully submitted,

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J. EDWARD JOHNSON,
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